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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1610

LEE N. ROMANO and SCHAUMBURG PLANET PROJECT CORPORATION,

Petitioners,

vs.

DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

JURISDICTION

A.

SINCE NO FEDERAL CONSTITUTIONAL QUESTION WAS PASSED UPON BY THE ILLINOIS SUPREME COURT, THE WRIT SHOULD BE DENIED.

No federal constitutional issue was presented for review to the Supreme Court of Illinois and as a result no federal constitutional issue was passed upon by the Supreme Court of Illinois. See opinion of the Supreme Court of Illinois, Petition for Writ, App. 5, et seq. (The issues presented to the Supreme Court of Illinois by petitioners herein are set out in Appendix)

No federal constitutional issue was presented for review to the Appellate Court of Illinois and as a result, no federal constitutional issue was passed upon by the Illinois Appellate Court. See opinion of the Illinois Appellate Court, Petition for Writ, App. 16, et seq. (The issues presented to the Illinois Appellate Court by petitioners herein are set out in Appendix)

While an attempt was made to raise the question of Federal constitutional rights in the property owners' (petitioners herein) petition for rehearing in the Illinois Supreme Court, said petition was denied without comment and did not import a decision of the possible federal question raised. *Consolidated Turnpike Company* v. *Norfolk & Ocean View Railway Company,* 228 U.S. 326 (1913); *St. Louis & San Francisco R. R. Co.* v. *Shepherd,* 240 U.S. 240 (1916). In *Shepherd* this court said (p. 241):

> "The claim under the Carmack amendment was first set up and asserted in a petition for rehearing after the judgment in the trial court was affirmed by the Supreme Court of the State. The petition was not entertained, but was denied without passing upon the

> Federal question thus tardily raised. That question, therefore, is not open to consideration here."

American Surety Co. v. *Baldwin,* 287 U.S. 156 (1932) is to the same effect. See also *Hulbert* v. *City of Chicago,* 202 U.S. 275 (1906). In *Hulbert* in pointing out that the Supreme Court of the United States did not have jurisdiction of the writ of error to the Illinois Supreme Court presented therein, this court pointed out (p. 281):

> "Nor was a right under the Constitution of the United States necessarily involved in the determination of the cause. And the Supreme Court was justified by its rulings in omitting the consideration of rights under the Constitution of the United States. According to the practice of the court, an error not assigned is not open to review (citing case). Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned (citing case). And such rule of practice will be recognized by this court (citing case). It follows that this court has not jurisdiction of this writ of error (citing cases). Writ dismissed."

In the case at bar the Illinois Supreme Court determined the questions raised, as in *Hulbert,* without consideration of any Federal or State constitutional question, and under the above decisions this court has no jurisdiction of this writ of error.

B.

IN ANY EVENT, THE QUESTIONS RAISED BY PETITIONERS ARE FRIVOLOUS AND THIS COURT SHOULD THEREFORE DECLINE TO ISSUE THE WRIT.

This court has held many times that it would not pass upon a frivolous federal question. In *Consolidated Turnpike Company* v. *Norfolk and Ocean View Railway Com-*

pany, 228 U.S. 326 (1913), this court held that the claim that the judgment operated to take the property of the petitioner without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averments of fact upon which the claim must depend that the question is real and substantial. We submit that the facts (not the surmises of petitioners' counsel), as we will develop them herein, do not establish any real and substantial federal question.

The attempts to invoke the 14th Amendment provisions as to due process and just compensation, as petitioners do herein, are ordinarily not considered a basis for issuing a writ of error.

In *Dohany* v. *Rogers,* 281 U.S. 362 (1930), an eminent domain proceeding, this court pointed out (281 U.S. 369) that:

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."

In *Madisonville Traction Company* v. *Saint Bernard Mining Company,* 196 U.S. 239 (1905), where this court held that a state condemnation suit could be removed to a Federal court where there was a diversity of citizenship, it stated at p. 254 of the opinion in that case:

> "But the question whether the property is authorized by the local statute to be condemned, as well as the question of the amount of compensation to the owner, could not come here by writ of error from

the state court. Such questions would not ordinarily involve a Federal right."

In *Roberts* v. *New York*, 295 U.S. 264 (1935), a condemnation proceeding, this court pointed out that not every mistake of a court in ruling on evidence amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have.

> "Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. 'It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment.' " 295 U.S. 278.

If it can be said that petitioners are relying upon due process, then the answer to that is that all that is essential for due process in condemnation cases "is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process which is required by the Federal Constitution." *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U.S. 557, 569 (1898).

In *McGovern* v. *New York*, 229 U.S. 363, 371 (1913), Mr. Justice Holmes stated:

> "As it is put in the case most frequently cited in favor of the right to a writ of error, 'we are permitted only to inquire whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the company's right to just compensation.' "

and again,

> "The final judgment of a state court 'ought not to be held in violation of the due process of law enjoined by the 14th Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation.' "

The complete facts as herein set forth demonstrate completely that the petitioners were not denied due process or just compensation.

QUESTIONS PRESENTED

The only questions actually presented in this case are whether this court has jurisdiction to grant the Writ petitioned for here and if it does, whether it should do so in light of the frivolous character of the questions raised and in light of the facts of the case as hereinafter disclosed.

The Supreme Court of Illinois has not passed upon any federal question and under the cases above cited there is no federal question before this court. Even if petitioners could be held to have properly invoked the 14th Amendment considerations, the cases above cited affirm that due process or just compensation as provided for in the 14th Amendment do not require any higher decree of responsibility for counsel for a public body in eminent domain proceedings than in any other proceedings and as they also affirm where there is substantial compensation, as there was in this case, and ample opportunity afforded petitioners to persuade a jury as to fair market value, there is no due process or just compensation question for this Court.

Further, the facts presented hereafter will disclose that petitioners were treated fairly throughout the trial, the

case was presented strictly within the Illinois rules of evidence and there was no failure of the state courts to protect the interests of the property owner.

STATEMENT OF THE CASE

In addition to using their "Statement of the Case" as a vehicle for argument rather than a true statement of the case, petitioners have been somewhat less than frank and honest in the presentation of facts and argument. They have omitted some of the most pertinent facts on which the trial court and the appellate courts of Illinois relied and pointed out in their various opinions and in their argument petitioners have tried to mislead the court as to what actually took place.

It is necessary, therefore, to present this statement of the case.

The State of Illinois through its then Attorney General and his assistants, filed on July 3 and July 8, 1968 two separate condemnation proceedings against two parcels of land comprising 20+ acres which were part of an 86 acre tract of land, not in any municipality, at the southwest corner of two 2-lane roads, Higgins Road and Illinois Route 53. The two parcels, denominated Parcel 13 and Parcel 17, were to be acquired in connection with the widening of Higgins Road (on the north end of the tract) into a 6-lane road (3 lanes in each direction) and for the construction of Interstate I-90, partly in Route 53 (on the east side of the tract). Interstate I-90 was also to have 6 lanes of traffic (3 in each direction) and was to be carried over, and have a complete interchange in connection with, Higgins Road. There were no utilities on the 86 acre tract, which was served by septic fields and one water well. It had some nursery stock on the part of it that was

not too wet and a few ramshackle buildings which housed migrant Mexican labor.

The 86 acres, which lay in a predominantly farm area, were sold by Klehm, a nursery operator and the owner of large, vacant holdings, to Schaumburg Planet Project Corporation (Romano), on March 7, 1968, just four months before the date of the filing of the petitions to condemn, for $1,700,000 or slightly less than $20,000 an acre, with the proviso that the parcel would be annexed to the Village of Schaumburg, which lay to the west, and would be rezoned for planned development use. Subsequent to the petition to condemn being filed it was so annexed and rezoned.

Shortly after the petition to condemn was filed the State filed a motion to take title to Parcels 13 and 17 (the 20+ acres here involved) under the quick take provisions and on July 16, 1968 a hearing was held on that motion which resulted in a preliminary finding as to compensation based on the testimony of one Joseph Dillon, an appraiser for the State. He testified to $484,000 for Parcel 17, including (which the attorneys, who are questioning the candor and fairness of the State, conveniently omitted to point out), $47,700 for nursery stock. He testified to $23,200 for Parcel 13 and this figure included $2,700 for nursery stock. The combined acreage of Parcels 13 and 17 was 20+ acres—the remainder of the 86 acre tract available for development was 65+ acres. He stated that in his opinion the damage to the remainder was $93,400, attributable to the taking of both tracts. Joseph Dillon's combined valuation of Parcels 13 and 17 eliminating the nursery stock (payments for which were to be made to Mr. Klehm and which was not included in valuations at the trial, 27 months later, as to final compensation) was $456,800 (not

$507,200 as stated by petitioners in their statement of the case). This was slightly above the valuation of $413,000 by the State's witness Curtis at the trial as to final compensation. No evidence as to value was produced by the property owners in the quick take proceedings. Joseph Dillon was not retained by the present Attorney General of the State of Illinois (William J. Scott) and neither were the attorneys for the State who handled the quick take. They were appointees of the previous Attorney General. At the quick take hearing, Joseph Dillon was not asked concerning, nor did he indicate that he had given any consideration to or knew of, the Klehm sale to Schaumburg Planet Project Corporation; nor was he asked as to, nor did he discuss, possible benefits to the remainder arising from the construction of the I-90–Higgins Road interchange and the widening and improving of those roads.

Parcels 13 and 17 were consolidated for trial, with the valuation date fixed as July 8, 1968.

As a result of numerous requests for continuance by the attorneys for the property owners, the trial as to final compensation did not take place until October 1970. In the meantime a new Attorney General of the State of Illinois had taken office and new (the present) trial attorneys and appraisers for the State were appointed.

At the trial the petitioners herein relied upon the testimony of two valuation witnesses (who under Illinois law were required to value the property as of July 8, 1968) who gave no consideration to the sale of the very property four months before July 8, 1968. Nor was a single comparable sale introduced to support their valuations of the part taken and their estimate of damages to the remainder in the total sum of $3,300,000—which was twice what Romano's corporation had paid four months before for the

entire 86 acres (65 of which he retained, now situated upon highly improved roads, one of them an Interstate Route).

The verdict which the jury returned of $454,300 for the 20+ acres taken (which excluded the value of the nursery trees—$50,400) was within $2,500 of the preliminary valuation in the quick take proceedings for the taking of such 20 acres.

Between the quick take proceedings in July 1968 and the trial as to final compensation in October 1970, the improvement hereinbefore described had been built and in October 1970 the jury could and did view that improvement and rode over the part of it on petitioner's property. The appraisers for the State at that time had an advantage, which Joseph Dillon did not have—visual proof of the benefits of that improvement to the remaining 60 acres.

The verdict of the jury amounted to $22,500 an acre, or $2,500 an acre more than Romano's corporation paid for the property four months before the valuation date.

There was no cavalier approach by the State to constitutional guarantees; the owners' rights were protected by the trial court; both the Appellate and Supreme Court of Illinois carefully considered petitioners' contentions; there was no prejudice introduced into the record deliberately or otherwise; there was no "false suggestion" as to access; there was no attempt to have the jury set off benefits to the remainder as against the value of the part taken; there was no prejudicial cross-examination as to an inadmissible fact, all alleged in petitioners' "Statement of the Case" in their petition for writ. To the contrary, there was strict adherence to recognized procedures as we shall demonstrate *infra*.

On the other hand, petitioners and their counsel seem to have been dedicated throughout the proceedings and ap-

peals to the proposition that by endlessly repeating the allegations they have set forth here and before the Illinois courts, which rejected them, such allegations will somehow achieve respectability and acceptance.

The matters presented to this court in support of petitioners' Petition for writ of certiorari have now been presented to and rejected by three Illinois courts on six occasions without a dissenting vote—in the trial court during the trial before a trial judge who has since been elevated to the Appellate court, on the post trial motion in the trial court, to the Appellate court of Illinois on appeal from the trial court, to the same court on petition for rehearing, to the Supreme Court of Illinois on appeal, and to the same court on petition for rehearing.

What we have here, rather than any lack of fair play on the part of the State, its counsel and the courts, is an attempt by petitioners and their attorney to extract from the treasury of the State of Illinois, by persistent repetition of accusations which have constantly been rejected and shown to be without foundation by the courts of Illinois, some 3⅓ million dollars.

If this were to happen, then counsel for the State might well be subject to criticism.

REASONS FOR NOT GRANTING THE WRIT

In addition to the jurisdictional reasons for not granting the writ, which we have heretofore advanced, we now take up the different items on which petitioners rely in arriving at their conclusion that "The State of Illinois and Its Courts Have Repudicated Their Constitutional Duty of Candor and Fairness to Citizens in Eminent Domain Proceedings" (p. 8 of Petition For Writ) which is the sole ground urged by the petitioners for the issuance of the writ.

It is rather amazing that counsel for petitioners are the only ones among the able counsel who have represented the people who have been awarded billions of dollars (8 billion in the one year of 1967 according to petitioners, page 8 of their Petition) to discover that the courts have repudiated their constitutional duty in this type of proceeding.

We submit that when we analyze the petitioners' statements and arguments we will find that the lack of candor and fairness is rather on the side of petitioners and their counsel.

A.

THE QUICK TAKE PROCEEDINGS IN THE STATE LOWER COURT AND THE VALUATIONS ARRIVED AT THEREIN ARE NOT PROPERLY A CONSIDERATION IN DETERMINING WHETHER THE JURY TRIAL AS TO FINAL COMPENSATION WAS FAIRLY TRIED.

Petitioners complain that the amount determined as preliminary compensation in the quick take proceedings in the State lower court was more than the amount awarded by the jury in the trial to determine final compensation.

The whole concept of Quick Take proceedings is that they are totally separate and apart from, and with no

bearing upon, the jury trial to determine final compensation.

Under the provisions of the Illinois statutes (Ill. Rev. Stat., c. 47, Sec. 2.2(d)) the quick take award cannot be used as evidence in the trial of the case and cannot be disclosed in any manner to the jury impaneled to decide upon compensation. As a result it does not properly have a place in the Petition for Writ; but because petitioners have seen fit to make it a part of their Petition, we point out some facts in connection with the quick take award which they have failed to point out. Among other reasons for the statutory provisions prohibiting disclosure of the preliminary compensation arrived at in quick take proceedings is that, as in the case of offers of settlement made prior to condemnation, a figure for preliminary compensation which will be higher than other appraisals in the condemnor's files is often given in an effort to get title without a fight over valuations in the quick take proceedings. This enables the quick take proceedings to be accelerated, but as everyone is aware such preliminary determination is not a guaranteed award and does not enter into the determination of final compensation.

In this case, as often happens, the attorneys for both the State and for the landowner at the time of the trial (1970) were different than those participating in the quick take proceedings (1968). The attorneys for the State in the quick take proceedings were special assistant attorneys general appointed by a different Attorney General than the present one (William J. Scott), who subsequently appointed present counsel as trial counsel for the State. The defendants had various sets of attorneys through quick take, depositions, trial and appeal.

The appraiser for the State at the quick take (Joseph Dillon) was also an appointee of a former Attorney General.

The jury trial as to final compensation was unduly delayed by numerous requests for continuance by the various attorneys for the defendants, the original trial date being June 26, 1969 and trial being finally held in October, 1970. In the meantime the improvement had been built and other appraisers employed by the State. These appraisers (and, incidentally, the jury) had the benefit of seeing the completed improvement, which has been described in our Statement of the Case.

These appraisers also had the benefit of legal advice from the State's trial attorney (who is also the State's attorney on this appeal) that a transaction (hereinabove described) between one Klehm and Romano's Corporation, one of the petitioners herein, four months before the petition to condemn was filed (the date of fixing the value of the whole of the property, of the part taken and of damages to the remainder) was a sale to which they could give consideration in arriving at their valuation and not an exchange as contended for by the property owners. They also had the benefit of advice that benefits to the remainder which resulted in the remainder increasing in value after the taking could be set off against damages to the remainder. The appraiser (Dillon) who testified at the quick take proceedings evidently did not have the benefit of such advice.

If these facts were not brought to this court's attention, one might gather from the allegations of the petitioners that there was some sort of conspiracy on the State's part to lower the value of the petitioners' property between the time of the quick take and the trial in 1970. Nothing could be further from the truth.

As the Supreme Court of Illinois has often pointed out, it is common for valuation witnesses in condemnation

cases to vary greatly in their opinions of just compensation. *City of Chicago* v. *Harrison-Halsted Bldg. Corp.*, 11 Ill. 2d 431, 436, 143 N.E. 2d 40, 44 (1957); *Illinois Light and Power Co.* v. *Bedard*, 343 Ill. 618, 620, 175 N.E. 851, 852 (1931). So it was not unusual, especially in view of their knowledge of the Klehm-Romano sale, that the three witnesses who testified for the State as to value in 1970 had slightly different ideas of value than the appraiser who testified at the quick take in 1968. They had different concepts of the applicable law. They were appraisers of repute and vast experience, having held high office in all appraisal organizations and one of them, M. Edward Smith (Excerpts From Record, p. 280) was a witness sometimes used by the property owners' trial attorney (Excerpts From Record, p. 285). Mr. Smith was not even cross-examined by Mr. Dillon when he expressed an opinion that the value of the remainder after the taking, taking into consideration the construction of the improvement, was $65,200 more than as a part of the whole before the taking (Excerpts From Record, p. 951).

The insinuation of petitioners that, because the testimony of the State's witnesses differed at the 1970 jury trial as to final compensation from that of the appraiser in the quick take proceedings, the State and its counsel were conspiring to depress the value of petitioners' property and to deprive them of certain rights is completely negated by the facts, as both the Illinois Appellate Court and the Illinois Supreme Court recognized on appeal.

Because of the varying views of different appraisers and attorneys it is not uncommon for the final verdict in an eminent domain proceedings to be less than the preliminary compensation agreed upon or fixed in quick take. Some examples of this are: In *Department of Public*

Works and Buildings v. *Christensen*, 25 Ill. 2d 273, 184 N.E. 2d 884 (1962), the compensation fixed on quick take was $34,250 and the verdict, upheld on appeal, was $21,500. In *Department of Public Works* v. *First National Bank*, 61 Ill. App. 2d 78, 209 N.E. 2d 21 (1965), the compensation fixed in quick take was $3,500; the verdict, sustained on appeal, was $1,700.

In comparing the valuation at the quick take with the valuation on trial, the petitioners again have been somewhat less than candid with the court. They state that at the quick take hearing the State's witness (Joseph Dillon) testified to $507,200 for the part taken and $93,400 for damages to the remainder. Actually, at that time (1968) Joseph Dillon was testifying to two separate parcels of land (Parcels 13 and 17) which were subsequently consolidated for trial and his actual testimony as to the value of Parcel 17 was $484,000 and the value of Parcel 13 was $23,200. (It can be noted that when the taking is consolidated, the value might well be less than the total of two separate parcels.) These figures included $47,700 for nursery stock on Parcel 17 and $2,700 for nursery stock on Parcel 13, or a total of $50,400 for nursery stock. The nursery stock, by stipulation of the parties, was not to be considered in the trial of the case and was not taken into consideration by the valuation witnesses for the State as the party (Klehm) who sold the property to Romano was to get the $50,400 for the nursery stock. Subtracting the $50,400 from the combined taking, Joseph Dillon's figure for the combined taking which should be compared to the testimony at the jury trial as to final compensation is not $507,200 but $456,800. The testimony at the trial of the State's witness, Curtis, was $413,000.

It must be readily apparent that counsel for the prop-

erty owner was not interested in a settlement even at Joseph Dillon's figures of $456,800 for the part taken and $93,400 for damage to the remainder or they would have settled at that time. They had bigger game (3⅓ million dollars) in view.

Another vital factor in considering whether this court should police condemnation proceedings in Illinois as the result of the verdict in this case, and one which the petitioners have failed to mention, is that *four months* before the petition to condemn was filed in this case Romano's corporation, one of the petitioners herein, bought the 86 acre tract for $1,700,000 or a little less than $20,000 an acre. The verdict of the jury amounted to $22,500 an acre. It must be apparent that it would be extremely difficult for any conscientious appraiser to appraise the property at much above $20,000 an acre or for any conscientious jury to award the property owners more than $2,500 per acre profit for holding title for four months.

B.

IT WAS PERFECTLY PROPER AND ACCEPTED PRACTICE FOR COUNSEL FOR THE STATE TO ASK FOR, AND FOR THE VALUATION WITNESSES TO GIVE, THE VALUE OF THE REMAINDER AFTER THE TAKING IN DOLLARS. THIS PROCEDURE WAS NOT, AS ALLEGED BY PETITIONERS, IN APPENDIX A OF THEIR PETITION FOR WRIT, ERRONEOUS AND IT WAS NOT "DELIBERATELY SUGGESTED INADMISSIBLE MATTER."

Petitioners, in Appendix A to their Petition, point out what they claim as an example of counsel for the State

deliberately suggesting inadmissible matters to the jury, namely, that under his questioning the valuation witnesses for the State testified that the remainder after the taking and the construction of the public improvement was worth more in dollars than it was as part of the whole before the taking. Petitioners also complain because an instruction was not given by the trial court (although not requested by them) that benefits to the remainder could not be set off against compensation for the part taken.

To correctly understand the position petitioners are in now it must be remembered that in their appeals in the Illinois Appellate Court and the Illinois Supreme Court, the point they were primarily relying upon was that the sale to Schaumburg Planet Project Corporation was not a sale but was an exchange of properties. They realized that there was no future to their excessive claims for compensation ($1,030,000 for the part taken, $50,000 an acre, and $2,292,500 for damages) if they were confronted with a sale of the very same property at $20,000 an acre, such sale taking place just four months before the taking.

After the Illinois Appellate Court and the Illinois Supreme Court, without dissent, had both held that the transaction was definitely a sale which was competent evidence, the objection to the admission of the sale was dropped by petitioners in their petition for rehearing in the Supreme Court of Illinois and before this court and petitioners began to reach for other straws to which to cling.

As the Illinois Appellate Court pointed out in its opinion (Petition for Writ, App. 26), the appellants (petitioners herein) did not claim that the jury was influenced in

their valuation of the part taken by the testimony as to increase in value of the remainder after the taking—the most petitioners herein claimed at that time was that this testimony "may well have caused" the jury to be influenced, a pure speculation, as the Illinois Appellate Court characterized it. With the hope of the petitioners gone that they could convince the courts that a sale for cash was really an exchange of properties, the point that they were prejudiced by the State's testimony as to the value of the remainder after the taking and the two other minor points referred to in the Appendix to the Petition for Writ are blown up out of all proportion in a desperate attempt to get another chance at 3⅓ million dollars.

The burden was on the property owners to prove damages to the remainder. *City of Chicago* v. *Provus,* 415 Ill. 618, 623, 114 N.E. 2d 793, 795 (1953). When they failed to do this, they conjured up this objection. But as far back as this counsel can remember (and his credentials are thoughtfully provided by petitioners in their Petition for Writ), witnesses have testified to the value in dollars of the remainder before the taking as part of the whole and to the value in dollars of the remainder after the taking with the improvement in place. See *Capitol Building Co.* v. *City of Chicago,* 399 Ill. 113, 77 N.E. 2d 28 (1948); *Department of Public Works and Buildings* v. *Bloomer,* 28 Ill. 2d 267, 270, 271, 191 N.E. 2d 245, 248 (1963); *Forest Preserve District* v. *Chicago Title and Trust Co.,* 351 Ill. 48, 56, 57, 183 N.E. 819, 822 (1932); *Department of Public Works* v. *Hubbard,* 363 Ill. 99, 101, 102, 1 N.E. 2d 383, 384 (1936). Recommended Illinois Pattern Instruction No. 300.45 states that "the measure of damages is the difference between the *fair cash market value* of the remainder before the taking and the *fair cash*

market value of the remainder immediately after the taking." How could one possibly testify as to the fair cash market value of the remainder after the taking without putting a *dollar value* on it? Petitioners also recognized that *value* was the criteria in their tendered Instruction No. 18 in the trial court.

In *Department of Public Works and Buildings* v. *Crumbaugh*, 1 Ill. App. 3d 761, 274 N.E. 2d 161 (1971) the question of testifying to benefits in dollars was directly raised on appeal and the Appellate court of Illinois approved the practice of testifying to a dollar value for the remainder after the taking.

Far from attempting, as charged, to suggest inadmissible matter to the jury, counsel for the State was meticulously following procedures which had been confirmed over the years.

Admittedly, the petitioners did not offer an instruction on this point. Ill. Rev. Stat. c. 110, par. 67(3) provides that: "No party may raise on appeal the failure to give an instruction unless he has tendered it." See also *Chicago Land Clearance Commission* v. *Darrow*, 12 Ill. 2d 365, 146 N.E. 2d 1 (1957), and *People* v. *Damen*, 28 Ill. 2d 464, 469, 193 N.E. 2d 25 (1963).

Petitioners' attempt to excuse themselves for not tendering an instruction by stating that the trial court had indicated he would not give anything but Illinois Pattern Instructions. This is not so. What he did indicate was that if an Illinois Pattern Instruction covered a situation, he would be inclined to give that instruction rather than one counsel had fabricated. The fact of the matter is that the trial judge (Excerpts from the Record, p. 846) stated that he was going to permit testimony in dollars as to the before and after value of the remainder

and that if there was any question a precautionary instruction could be used. In spite of this admonition, the attorneys for the property owners failed to offer an instruction. It is not likely that an attorney of Mr. Dillon's self-admitted ability (Excerpts from Record 1101) would not tender an instruction if he thought it correctly stated the law, even if a judge said he wouldn't give it.

Petitioners also did not make an objection to this testimony. See opinion of Supreme Court (App. 11, Petition for Writ).

Just on general considerations it is obvious that if an appraisal witness was not permitted to give an after taking valuation of the remainder in dollars, it is unlikely that a jury could give much credence to his testimony that there were no damages to the remainder.

In *Department of Public Works and Buildings* v. *Bloomer,* 28 Ill. 2d 267, 270, 271, 191 N.E. 2d 245 (1963), in an opinion by Justice Schaefer, it was stated:

> "Only one of the defendant's witnesses attempted to testify directly to this issue (re damage to the remainder). Upon the basis of having 'been by' the theater before the taking, and having heard the testimony of other witnesses, W. E. Thebus, a real estate broker and appraiser, stated that 'the extent of the damage, that is, the amount of money that a willing buyer would be willing to pay, would be at least $118,570.18.' In weighing this ambiguous statement the *jury was entitled to take into account that the witness did not state his opinion of the value of the tract before or after the taking* and that he did not enumerate or itemize the factors he took into account." (emphasis added)

The court in the *Bloomer* case then went on to point out that petitioner's witnesses testified in the approved

manner, directly to the issue, giving the value before and after and itemized the elements considered.

In view of the holdings in the above Illinois cases, counsel for the State could have been criticized if he had not proceeded on the question of damages to the remainder in the manner in which he did. There is no basis for petitioners' contention that he was suggesting inadmissible matter to the jury.

C.

COUNSEL FOR THE STATE DID NOT CREATE ANY FALSE IMPRESSIONS AS TO THE AVAILABLE ACCESS.

Equally without foundation is the second contention of petitioners (Petition For Writ, App. 2) involving the question of access to Higgins Road. Again it is the petitioners who are guilty of lack of candor and fairness in their statements, and not the State or its counsel. There is nothing in the record to suggest that counsel for the State was attempting to get any improper evidence before the jury in connection with access. In fact, as the Supreme Court opinion (Petition For Writ, App. 14) took care to point out, not only does the record not support petitioners' allegations to that effect in their appeal to the Illinois Supreme Court (the same allegations as in Petition for Writ on this point) but, on the contrary, the record negates such allegations. The Supreme Court opinion points out that the witness was asked by counsel for the State only to testify as to the traffic flow according to the improvement "as it is now constructed", the improvement having been constructed at the time of the trial in accordance with the plans offered in evidence.

The correct traffic flow was not only testified to by the witness in question on cross-examination when one of the assumptions he made was pointed out as erroneous, but also by an expert for the land owners (Excerpts from Record, p. 485, et seq.) and emphasized in argument to the jury by counsel for the land owners (Excerpts from Record, p. 1090, 1099). The traffic expert for the property owners was as guilty or more guilty than the traffic expert for the State in making a wrong assumption, as his calculations were made as of *1990*, not as of 1968 when the taking occurred.

In connection with the entire question of damages to the remainder, including the highest and best use of the remainder with the access afforded, which the jury viewed, it must be borne in mind that without impeachment of any kind the valuation witnesses for the property owners pointed out that the specific benefits to the remainder were (1) that being adjacent to expressways, it would sell for more even if it did not have direct access to the expressway (it had indirect and convenient access); (2) it could be seen from the expressway, which gave it identification; (3) it had improved access to a larger part of the Chicago Metropolitan Area (Excerpts from Record 943, 944); (4) it had high speed access to points North, South, East and West; and (5) that experience showed that remainders at a grade separation such as resulted from the State's construction inevitably increased in value (Excerpts from Record, 959, 960). Further, the State's valuation witnesses were able, without contradiction or impeachment, to point out specific multiple family and commercial developments which flourished with access similar to that which the remainder of the Romano Corporation property had—one such development being in Oak

Brook at 31st and Route 83 (Excerpts from Record, 926, 927), one at Cumberland Avenue and the Northwest Expressway (office building, apartment building and duplexes with a 20 foot access road) and one at Algonquin Road and the clover leaf off Route 53, where a narrow access road served a development consisting of a Holiday Inn, a restaurant, Buick Motor Service Garage, etc. (Excerpts from Record, 964, 965, 970).

D.

THERE WAS NOTHING IMPROPER IN THE CROSS-EXAMINATION OF THE WITNESS McCANN.

Finally, petitioners list as an example of improper procedures the cross-examination by counsel for the State of the property owners' valuation witness McCann. They assume that this was examination "on value of property which under the rules of evidence the cross-examiner could not put into evidence on direct examination" and cite Righeimer on Eminent Domain in Illinois and *Forest Preserve District* v. *Chilvers,* 344 Ill. 573, 176 N.E. 720 (1931) as authority for the claim that such type of cross-examination is improper.

Of course, as was recognized by all the Illinois courts, this was not an attempt by the State to put in a valuation on cross-examination which could not be put in on direct. It was an attempt to impeach the witness by showing that he did not approach the valuation of similar properties directly across the street from each other with impartiality but that when he testified on the property across the street his valuation per acre was considerably less than when he testified for Romano and that, unlikely as it seems, although the properties were similarly af-

fected by the improvement, he did not testify to and did not have an opinion as to damages to the remainder of the tract across the street, while he had an opinion that Romano's remainder was damaged $2,292,500. There was no obstacle which would have precluded the State from calling this witness as its witness and eliciting this information and therefore the quotation from Righeimer has no application to this case. In the situations referred to in the quote from Righeimer, there were obstacles—such as a sale which could not be introduced on direct because it was not comparable or a sale which could not be introduced on direct because the purchaser had the power of condemnation.

In *Forest Preserve District* v. *Chilvers*, 344 Ill. 573, 176 N.E. 720 (1931), cited by petitioners, the Voss property as to which inquiry was made on cross-examination was totally dissimilar to the property involved in the condemnation proceedings as it was subdivided property which the property being condemned was not and as the Voss property was improved with a twelve-flat apartment building, whereas the property being condemned was improved with a one-story stucco building; the Voss property was zoned for apartments, the property being condemned for single-family residences. 176 N.E. 721, 722. But the Romano property and the property across the street from it were both vacant tracts, with similar frontages on Higgins Road and Route 53, with similar topography, and with remainders having similar access problems.

The cross-examination for impeachment purposes was proper. *State ex rel.* v. *Collier*, 93 Id. 19, 454 P. 2d 56 (1969); *State ex rel.* v. *Cole Fire Protection District*, 92 Id. 810, 451 P. 2d 1011 (1969); *California ex rel.* v. *Stevenson*, 5 Cal. App. 3d 60, 84 Cal. Rptr. 742 (1970).

On this point once again counsel in his Petition for Writ has omitted facts which bear directly on the question raised. This is probably because counsel did not participate in the trial and is not wholly familiar with the record. But whatever the reason, petitioners have failed to point out that not only did they not object (Excerpts from Record, pp. 722, 723) for the spurious reason they advance that an objection was useless (App. 4, Petition for Writ); but also that the trial attorney for the landowners did not move to strike the testimony. He in fact welcomed such inquiry with this statement: "Let him answer * * * let him explain it" (Excerpts from Record, p. 722).

Appellate courts in Illinois have consistently held, as have federal courts and courts in other states, that experienced counsel, "cannot take a chance of failing to make objection and then, upon receiving what they consider an adverse verdict, claim error". *County of Cook* v. *Colonial Oil Corp.*, 15 Ill. 2d 67, 75, 153 N.E. 2d 844, 848 (1958); *City of Chicago* v. *Giedraitis*, 14 Ill. 2d 45, 50, 150 N.E. 2d 577, 580 (1958).

Once again it appears that counsel for the State rather than having indulged in any improper conduct was merely trying the case as best he could by established rules. The plea of the petitioners here is a plea for counsel for the State in some nebulous, unexplained way to represent the property owner as well as the taxpayers of the State. It seems obvious from the unsupported, unbelievable testimony of the paid witnesses for Romano and his corporation that counsel for the State has enough of a task in preventing the treasury of the State from being raided. Not only were the attorneys for the petitioners herein

content to put on this unbelievable testimony, they also succeeded in keeping out evidence that these petitioners had (in a hurried effort to induce the village officials to upgrade the rezoning on this property prior to trial and consequently attempt to provide a basis for unconscionable valuations) stated to the Village of Schaumburg officials that the access to be furnished by the State would create no problems as to the remaining property as they wished it rezoned (State's Exhibit 26 for *id.*).

The frenzy with which counsel for the property owners were attempting to harness the State with compensation for the taking of 20.65 acres and damage to the remaining 65 acres in a total sum of $3,300,000 (or more than twice what they paid for the whole 86 acres four months before) is also indicated by these excerpts from the final argument of counsel for the land owners:

> "I am thankful I don't have to negotiate the case with Frank Righeimer." (Excerpts from Record, 1077)
>
> "You don't know what the tax consequences of Klehm's transactions were." (Excerpts from Record, 1078)
>
> "If you want my guess, the fellow who is in real serious trouble is little Jim Curtis * * * he is not an honorable honest person in this courtroom." (Excerpts from Record, 1090)
>
> "* * * when you have written out the verdict that you are going to give in this case, I want you to go back out to that area, satisfy yourself in your own mind that you treated a fellow citizen fairly and go out and talk to Campanella, and go out and talk to Leavitt, and talk to other realtors and the owners in the area and ask them what you can buy it for.
>
> "Now, if you can buy that property for $20,000 an acre, God love you, and you don't stay home tomor-

row. Go out. See your mortgage banker, borrow on your life insurance, sell your automobile, get all the money together that you can get, because I am going to say I know twelve millionaires. I met them up there in Judge Egan's courtroom in 2307, because that is exactly what each one of you can be, and you can be it within 48 hours. If you can buy this property for $20,000, you will be able to sell it immediately for $50,000." (Excerpts from Record 1099, 1100)

"* * * and that's their whole case, besides Mr. Derrah, and we don't know what circumstances were involved in his leaving Real Estate Research Corporation." (Excerpts from Record 1101)

"If this was your property that was being condemned, who would you go to see? Would you take Curtis' opinion and Derrah's opinion? Would you want Righeimer representing you? I will lay it on the line. I think this jury would take Dillon ***." (Excerpts from Record 1101)

"* * * and this is a difficult condemnation case and you should have had more of this explained to you by Mr. Righeimer, instead of having me take up my time." (Excerpts from Record 1105)

"I want you to know who was the phony in this courtroom, and who put up the phony witnesses on the stand, and who masqueraded in here." (Excerpts from Record 1111)

"* * * and it is a pity that the State of Illinois sees fit to do this to a piece of property * * *. Don't make this client pay for the mistake of the Department of Road (sic) and Buildings of the State of Illinois." (Excerpts from Record 1112, 1113)

CASES CITED BY PETITIONERS

The cases cited by petitioners in support of their Petition for Writ (Pp. 10 and 11 of Petition for Writ) are most inapposite. *Mooney* (294 U.S. 103), *Napue* (360 U.S. 264), *Giglio* (405 U.S. 150) and *Brady* (373 U.S. 83) all involved actions of the prosecuting attorney in criminal cases in which the prosecution was based on known and uncorrected perjured testimony (*Mooney*) or the failure of the prosecuting attorney to disclose to the jury that convicted witnesses for the prosecution had been promised consideration for their testimony although on examination conducted by the State's Attorney, the witnesses testified that they had not been promised any consideration (*Napue* and *Giglio*) or the deliberate suppression by the State in the trial of one of two defendants of the confession of his fellow defendant (*Brady*). In each of these cases the damaging evidence was allowed to go *uncorrected.*

These were deliberate, knowing acts of a prosecutor to obtain a verdict he knew was not justified by the evidence. Apart from the fact, as the petitioners themselves admit, that there is a different standard of protection of defendant's rights in criminal cases than in civil cases, there is nothing in the facts as to the trial of the case at bar which could be correlated with the acts of the prosecutor in the cited cases.

Lynch v. *Household Finance Corporation,* 405 U.S. 538 (cited at p. 11 of the Petition for Writ) is inapposite because in the case at bar there was no attempt to minimize individual rights in property guaranteed to them by the Constitution. The question of individual rights *vis a vis* property rights is a straw man, set up by petitioners.

CONCLUSION

Irrespective of whether there is any obligation upon the State, its counsel and State Courts to coddle the owner of property in State eminent domain proceedings and irrespective of whether the standards applicable to the State, its counsel and the courts in such proceedings are different than in any other civil litigation or different than for any other litigant (and there has been no showing by petitioners herein to that effect), it is clear that in the trial of this case the trial procedures which have been sanctioned over a long period of time were strictly adhered to by the State, its counsel and the Illinois Courts and that there is no basis for claiming that the petitioners did not have due process or did not get just compensation.

The writ should be denied.

Respectfully submitted,

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APPENDIX

The following issues were presented for review by appellants (petitioners herein) before the Illinois Supreme Court (P. 2 appellant's brief before the Supreme Court of Illinois):

"1. Whether the trial judge erred in receiving in evidence a contract involving a trade or exchange of the subject property consisting of 86 acres for cash and 843 acres of other land in Cook, Lake and McHenry Counties.

2. Whether, in a condemnation proceeding involving a partial taking, valuation witnesses for the State may express, in dollar amounts, an increase in the value of the remainder not taken alleged to have been brought about by the public improvement and, if so, whether an admonitory jury instruction must be given informing the jury not to deduct from the value of the part taken any increase in value to the remainder.

3. Whether the verdict of the jury finding no damage to the owner's remaining property not taken by the State is contrary to the manifest weight of the evidence and resulted from improper and misleading testimony introduced by the State and erroneous rulings by the trial judge.

4. Whether the owner's right to a fair and impartial trial was prejudiced by trial tactics utilized by counsel for the State."

No Federal constitutional issue was presented or passed upon.*

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* While mention is made in the title to Point III of appellant's (petitioners herein) brief in the Supreme Court that "The constitutional right of the owner to just com-

The following issues were presented for review by appellants (petitioners herein) before the Illinois Appellate Court (appellant's brief, p. 2, Appellate Court):

"1. Whether the trial court erred in receiving in evidence a trade or exchange of the subject property consisting of 86 acres and 843 acres of other land in Lake, Cook and McHenry Counties.

2. Whether the Appellant's right to a fair and impartial trial was prejudiced by the trial tactics utilized by counsel for the State.

3. Whether, in a condemnation proceeding involving a partial taking, valuation witness may express in dollars an increment in the value of a remainder after the taking in excess of the values of the remainder as a part of the whole prior to the taking.

4. Whether the trial court ruled correctly in failing to strike the testimony of certain of the State's witnesses.

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pensation was totally defeated by a State witness and counsel for the State deliberately misleading the court and the jury concerning crucial facts which led to the jury's verdict finding no damage to the owners' remaining property" and the same general statement is repeated in the text, the 14th Amendment is not specified and no Federal question is raised. Just compensation is also provided for by the Illinois constitution. The alluded to constitutional right which was allegedly defeated was not argued as such and the Illinois Supreme Court in its decision did not consider, discuss or allude to any constitutional question, much less any Federal constitutional question.

5. Whether the verdict of the jury finding no damages to Appellant's remaining property not taken by the State is contrary to the manifest weight of the evidence.

6. Whether the trial court ruled correctly on certain objections to evidence."